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Constitutional Law — Recidivist Statute As Applied Only To Prisoners Whose Prior Conviction Had Been In The State Of Virginia Is Not Unconstitutional. *Evans v. Cunningham,* 335 F.2d 491 (4th Cir. 1964). Petitioner, an inmate of the Virginia State Penitentiary, was serving an additional sentence imposed upon him under Virginia's recidivist statute which provides that *if* the Director of the Department of Welfare and institution obtains "knowledge" that a person confined in the Virginia Penitentiary under a judgment of conviction had been sentenced to like punishment in the United States prior to the present sentence, the Director shall give the information to the Circuit Court of Richmond which court has jurisdiction to impose an additional sentence. VA. CODE § 53–296 (1950). Petitioner contended that the statute, as applied, is not evenhanded since in practice it applies only to those prisoners whose prior convictions were within the State of Virginia and does not impose such additional punishment upon prisoners whose prior convictions were in a state other than Virginia. He contended that the statute was unconstitutional on the basis that such geographic classification was arbitrary and deprived him of equal protection of the law.

The Fourth Circuit Court of Appeals found that the statute merely requires the Director to report knowledge of prior convictions as it comes to him; it does not impose a duty upon him to seek out the means to prove the fact of such prior convictions at the recidivist hearings. Since only the state of Virginia supplies him with usable evidence in the form of exemplified copies of records of prior convictions, these are the only prior convictions taken into consideration. The Court of Appeals *held* that since the basis of the classification is a matter of practical utility rather than a geographical determination, Virginia's application of the statute is not arbitrary but necessary and does not, therefore, violate the constitution by depriving petitioner of equal protection of the laws.

There are few decisions dealing with the precise problem of this case. See *Sims v. Cunningham,* 203 Va. 347, 124 S.E.2d 221, *cert. denied,* 371 U.S. 840 (1962); Note, *Recidivism and Virginia's "Come-Back" Law,* 48 VA. L. REV. 597 (1962); however, the principle utilized to uphold the constitutionality of the Virginia statute is widely accepted. In *Standard Oil Co. v. Tennessee,* 217 U.S. 413, 420 (1910), it was stated that the fourteenth amendment is not to be construed "as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment." See ANNOT., 58 A.L.R. 28 (1929); ANNOT., 82 A.L.R. 345 (1933); ANNOT., 116 A.L.R. 209 (1938); 132 A.L.R. 91 (1941); ANNOT., 139 A.L.R. 673 (1942). See also *State v. Daley,* 147 Conn. 506,

163 A.2d 112, *cert. denied,* 364 U.S. 887 (1960); *People v. Johnson,* 412 Ill. 109, 105 N.E.2d 766, *cert. denied,* 344 U.S. 858 (1952); *Ex Parte Boman,* 160 Tex. Crim. 148, 268 S.W.2d 186 (1954).

Maryland has no habitual criminal statute comparable to that of Virginia, however, several statutes impose greater penalties for second offenders in relation to particular crimes, *e.g.,* MD. CODE ANN. art. 27, § 300 (Supp. 1964) (Narcotics); MD. CODE ANN. art. 27, § 558 (Supp. 1964) (Common thief) and MD. CODE ANN. art. 27, § 123 (Supp. 1964) (Drunkenness). Although the Maryland Court of Appeals has not treated the issue raised in the principal case, in *Garrison v. Superintendent of Md. State Reformatory for Males,* 218 Md. 662, 146 A.2d 431 (1959), it held that the imprisonment of the accused under sentence as a second offender under the narcotics laws is not unlawful because of alleged favoritism which had been shown to others who had been granted conditional commutation of their sentences. See also *Torres v. Warden, Md. Penitentiary,* 227 Md. 649, 175 A.2d 594, *cert. denied,* 369 U.S. 890 (1962).

Corporations — Right Of Stockholder To Recover For Attorney Fees In Connection With Short Swing Insider's Profits Recovered By Corporation. *Gilson v. Chock Full O'Nuts Corp.,* 331 F.2d 107 (2d Cir. 1964). Plaintiff attorney was engaged by plaintiff shareholder on a contingent fee basis to discover whether insiders had made short-swing profits in violation of § 16(b) of the Securities Exchange Act. 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1958). The attorney sent a letter to the corporation listing five insiders who had allegedly made such profits and indicating that the two year statute of limitations would soon bar action upon many of the transactions. Thereafter, the officials of the corporation told the attorney that upon investigation, no violation had been found. Confronted with this negative attitude and the prospective running of the statute, the attorney drafted a complaint, which he intended to file upon the expiration of the sixty day period fixed by the statute for action by the corporation. The corporation then instituted suit two days before the limitations statute would have barred many of the actions. The corporation recovered, and plaintiffs sued for reasonable reimbursement for attorney's fees. The Second Circuit Court of Appeals, applying equitable principles, held that plaintiffs were entitled to reasonable compensation for attorney's fees.

A stockholder who has been successful in maintaining an action under § 16(b) for a corporation's benefit where the corporation is unwilling to institute suit is entitled to reimbursement for reasonable attorney's fees. *Smolowe v. Delendo Corp.,* 136 F.2d 231 (2d Cir.), *cert. denied,* 320 U.S. 751 (1934); *Magida v. Continental Can Co.,* 176 F. Supp. 781 (S.D. N.Y. 1956). But if a stockholder, even after considerable effort, presents a claim to the corporation which the *corporation* subsequently prosecutes successfully, he is not entitled to recover attorney's fees. *Ibid.; Evans v. Diamond Alkali Co.,* 315 Pa. 228, 172 Atl. 678 (1934). However, in *Dottenheim v. Emerson Elec. Mfg. Co.,* 77 F. Supp. 306 (E.D. N.Y. 1958), *affirming* 7 F.R.D. 195

(E.D. N.Y. 1947), the court held that the stockholder could recover from the corporation even if action was not commenced by the stockholder. The court stated that the statute was intended to encourage stockholder vigilance by assuring the stockholder of reimbursement for expenses of his suit if it produced a benefit to the corporation. The court, in the principal case, agreed in substance with *Dottenheim* and attempted to reconcile this case with the analogous situation of an informer under federal informer statutes where reimbursement for attorney's fees is not allowed in absence of statutory authorization. *Marcus v. Hess,* 317 U.S. 537 (1943). However, the court, in the principal case, finding the services rendered to have been more than simple preparation of a request for the corporation to bring action under 16(b), concluded that it would run counter to the intent of the statute to deny compensation in this case. The court indicated that there are certain policy considerations against allowing recovery by a stockholder who volunteers to do what ought to have been done and could easily have been done by the corporation, considerations which are stronger when the statute of limitations has many months to run. These considerations, the court stated, were not present in this case. See discussion in 2 Loss, SECURITIES REGULATIONS §§ 1051–55 (2d ed. 1961). See generally: Hornstein, *Legal Therapeutics, The "Salvage" Factor in Counsel Fee Awards,* 69 HARV. L. REV. 658 (1956); ANNOT., 40 A.L.R.2d 1347 (1955).

Criminal Law — Insanity — Burden Of Proof. *Bradford v. State,* 234 Md. 505, 200 A.2d 150 (1964). The Maryland Court of Appeals ruled, in the principal case, that the circuit court had erred in excluding testimony of a psychiatrist to the effect that defendant was unable to distinguish between right and wrong, and adhere to the right and was insane under the M'Naghten rule. See *Spencer v. State,* 69 Md. 28, 13 Atl. 809 (1888); *Thomas v. State,* 206 Md. 575, 112 A. 2d 913 (1955). Furthermore, the court found this evidence was "sufficient proof of insanity to raise a doubt in the minds of reasonable men as to the defendant's sanity," and was therefore sufficient to overcome the initial presumption of sanity which exists in all cases. *Saldiveri v. State,* 217 Md. 412, 143 A.2d 70 (1958); *Lipscomb v. State,* 223 Md. 599, 165 A.2d 918 (1960). Although the question of who has the burden of proof on the issue of insanity had been raised in previous cases, the Maryland Court of Appeals had never decided it because there had been no case prior to *Bradford,* in which the determination was necessary to the result and the evidence presented was sufficient to overcome the initial presumption of sanity. For cases in which the evidence was insufficient to overcome the presumption see *Lipscomb v. State,* 223 Md. 599, 165 A.2d 918 (1960); *Saldiveri v. State,* 217 Md. 412, 143 A.2d 70 (1958); *Cole v. State,* 212 Md. 55, 128 A.2d 437 (1957); *Bryant v. State,* 207 Md. 565, 115 A.2d 502 (1955); *Thomas v. State,* 206 Md. 575, 112 A.2d 913 (1955). The Court adopted the

rule that once the initial presumption of sanity has been overcome, the prosecution must prove the defendant's sanity beyond a reasonable doubt.

The determination as to which party is to bear the burden of proving insanity depends upon the strength of this initial presumption of sanity. Under the "reasonable doubt" test, the burden of persuasion is placed upon the state; the presumption merely relieves the prosecution from introducing proof of defendant's sanity until the defendant produces evidence tending to show that he was insane. When this probability has been shown, the state must prove the defendant's sane guilty mind beyond a reasonable doubt, taking into account all of the evidence on both sides. States applying the "preponderance of evidence" test place the burden of proving insanity upon the defendant, *i.e.,* the presumption of sanity prevails until the contrary is established by the preponderance of evidence. The extent to which any presumption should shift the burden of proof must be decided upon considerations of policy. Courts which accept the latter test generally justify its application by reasoning that insanity may be too easily feigned under the former test and that proof of defendant's insanity is more readily available to defendant. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 212–40 (1954); Note, *The Insanity Defense — The Need for Articulate Goals at the Acquittal Commitment and Release Stages,* 112 U. PA. L. REV. 733, 740–41 (1964); WHARTON, CRIMINAL EVIDENCE §§ 30–31 (12th ed. 1932); WILLIAMS, CRIMINAL LAW §§ 165–67 (2d ed. 1961). In adopting the "reasonable doubt" test, the Court of Appeals stated it felt this approach was the more logical and that any problems created by finding persons insane under this rule were obviated by recent statutory changes which relate confinement for mental illness to danger to the community rather than to legal guilt. MD. CODE ANN. art. 59, §8(B) (1964 Replacement Vol. 5). For state by state holdings on this issue see WEIHOFEN, *supra* at 241.

Domestic Relations — Living "Separate And Apart" Within The Meaning Of Maryland Divorce Statute. *Lillis v. Lillis,* 235 Md. 490, 201 A.2d 794 (1964). Plaintiff husband brought suit for divorce "a vinculo matrimonii" under a Maryland statute providing that "the court may decree a divorce a vinculo matrimonii in the following causes . . . fifthly, when the husband and wife shall have voluntarily lived separate and apart, without any cohabitation for eighteen consecutive months prior to the filing of the bill of complaint. . . ." MD. CODE ANN. art. 16, § 24 (Supp. 1964). During the alleged eighteen month period, the husband and wife had, on two separate occasions, occupied the same residence, the first occasion lasting six weeks, and the second, two weeks; the reason asserted in both instances was "financial convenience." Both husband and wife testified that on neither occasion did they have sexual relations. The court held that these facts did not constitute "a living separate and apart, without any cohabitation," within the meaning of the statute.

Although this was a case of first impression in Maryland, the rule in virtually all jurisdictions with similar statutes is that where the evidence shows a living under the same roof during any part of the statutory period, a finding of "a living separate and apart" is precluded. The discontinuance of sexual relations is not adequate to satisfy the statute, under the theory that the statutes require a separateness of such a character as to be notorious in the neighborhood. 17 AM. JUR. *Divorce* § 185 (1938); ANNOT., 51 A.L.R. 763, 768–69 (1929); ANNOT., 111 A.L.R. 867, 871–72 (1937); ANNOT., 166 A.L.R. 498, 508–09 (1947); See also KEEZER, MARRIAGE AND DIVORCE § 455, p. 507 (3d ed. 1946); NELSON, DIVORCE AND ANNULMENT §§ 4.42–.48 (2d ed. 1945); 27A C.J.S. *Divorce* § 42(b) (1959). Only the District of Columbia holds a contrary view. *Hawkins v. Hawkins,* 89 U.S. App. D.C. 147, 191 F.2d 344 (1951); *Boyce v. Boyce,* 80 U.S. App. D.C. 355, 153 F.2d 229 (1946). In the latter case, it was said "the essential thing is not separate roofs, but separate lives. . . ." However, the statute involved in these cases does not expressly require that the parties "live apart" or "live separate and apart". For a listing of state statutes indicating the nature of separation required in each, see Comment, *Divorce on Ground of Separation,* 18 WASH. & LEE L. REV. 157, 164 (1961). For a related problem, see Comment, *Cohabitation During Pendency of a Divorce Action,* 17 WASH. & LEE L. REV. 243 (1962).

Evidence — Evidence Obtained By Illegal Search And Seizure Under Nongovernmental Auspices Is Admissible. *Sackler v. Sackler,* 255 N.Y.S.2d 83, 203 N.E.2d 481 (1964). In a suit for divorce, plaintiff husband presented proof of his wife's adultery which had been obtained by an illegal forcible entry into the wife's home by the plaintiff and several private investigators. The divorce judgment was for the plaintiff on a jury's verdict of adultery. The wife sought to have the illegally seized evidence ruled inadmissible. The wife argued that prior to *Mapp v. Ohio,* 367 U.S. 643 (1961), in which it was held as a matter of due process, evidence obtained by a search and seizure in violation of the fourth admendment is inadmissible in a state court, all evidence illegally procured had been admissible in New York irrespective of the status of the procurer; therefore, for uniformity's sake all such evidence should now be excluded. The New York Court of Appeals, stating that the fourth amendment has nothing to do with nongovernmental intrusions, held evidence wrongfully obtained by private individuals may be admitted in civil litigation, in the absence of constitutional or statutory compulsion for rejection. Judge Van Voorhis dissented, contending: (1) an officer who acts in violation of the fourth amendment is considered to be acting ultra vires; his act cannot be considered as "governmental" but "private," therefore the amendment should not be restricted as the majority has suggested; (2) admitting such evidence amounts to a utilization of such evidence by the court acting as an official branch of the state which would seem to be contrary to the purpose served by the rule in *Mapp*; and (3) no

distinction is made in *Mapp* between admissibility in civil and criminal cases. 203 N.E.2d at 484. Dissenting also, Judge Bergan stated that *Mapp* had wrought a change in the fundamental view of wrongfully obtained evidence rendering the rule of admissibility in private civil cases inconsistent and discriminatory. 203 N.E.2d at 485.

In civil cases, the prevailing rule is that admissibility of evidence is not affected by the illegality of the means through which the party, governmental or nongovernmental, has obtained the evidence. *Olmstead v. United States,* 277 U.S. 438, 466–68 (1928); 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940) (Supp. 1959 and 1964). MCCORMICK, EVIDENCE §§ 137–40 (1954). Therefore in the absence of constitutional or statutory restrictions, evidence which is otherwise admissible will not be excluded because it has been obtained fraudulently, wrongfully or illegally. *United States v. Lee Hee,* 60 F.2d 924 (2d Cir. 1932); *United States v. One 1956 Ford Tudor Sedan,* 253 F.2d 725 (4th Cir. 1958); 31A C.J.S. *Evidence* § 187 (1964); See *Martin v. State,* 203 Md. 66, 73, 18 A.2d 8 (1953). But see *Chambers v. Rosetti,* 226 N.Y.S.2d 27, 36 Misc. 2d 779 (1962), holding that evidence obtained through an illegal search and seizure by a governmental agent in violation of the constitution, is subject to exclusion in civil cases. Generally, the exclusionary rule relating to illegally seized evidence, as announced in *Mapp,* does not apply where the evidence was procured by an unlawful search made by a private individual acting on his own initiative. *Burdeau v. McDowell,* 256 U.S. 465 (1921). ANNOT., 50 A.L.R.2d 531, 570 (1956) and 84 A.L.R.2d 961 (1962) (both dealing with criminal cases).